Nos. 96-552 & 96-553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RACHEL AGOSTINI, *et al.*,

Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,

Respondents.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,

Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF THE INSTITUTE FOR JUSTICE, THE CENTER FOR EDUCATION REFORM, PARENTS FOR SCHOOL CHOICE, AND HOPE FOR CLEVELAND'S CHILDREN IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[*]

Amici curiae are organizations strongly committed to education reform and particularly to expanding parental choice in education. The legal issues raised in the present cases directly implicate *amici*'s institutional interests.

The Institute for Justice is a nonprofit public interest law center that litigates in support of private property rights, entrepreneurial freedoms, school choice, and other individual liberties. The Institute presently is defending the constitutionality of programs in Wisconsin, Ohio, and Vermont that allow parents to direct public education funding to the schools of their choice, including religious schools.

The Center for Education Reform ("CER") is an independent non-profit organization founded in 1993 to advance substantive reforms in public education by working to ensure that ideas critical to education reform are identified, understood, and implemented. CER is an active broker in bridging policies and practices through coalition building and by working with diverse constituencies to implement reforms that improve access, accountability, and assessment, and that help restore educational excellence and equity to America's public schools.

Parents for School Choice ("PSC") is a nonprofit community organization that provides information and

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[*] The parties have consented to the filing of this brief. *Amici* have filed letters of consent with the Clerk.

support for economically disadvantaged Milwaukee parents to expand the range and quality of educational opportunities available to their children. PSC was the leading catalyst for the expansion of the Milwaukee Parental Choice Program, Wis. Stat. § 119.23, which allows up to 15,000 low-income Milwaukee children to use their share of state education funds in private schools. PSC is an intervenor/defendant in litigation challenging the choice program's constitutionality.

Hope for Cleveland's Children ("Hope") is a nonprofit organization founded to improve the education of Cleveland's children and to maximize the options of Cleveland parents. Hope was instrumental in bringing about the Pilot Project Scholarship Program, Ohio Rev. Code Ann. §§ 3313.974-.979, which allows Cleveland youngsters to receive publicly funded scholarships to attend private schools or public schools in adjacent districts. Hope has opened two schools in Cleveland to serve economically disadvantaged youngsters. Hope is an intervenor/defendant in a lawsuit challenging the scholarship program's constitutionality.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Title I program at issue in these cases is designed to address one of this Nation's most vitally important problems: the education of underprivileged children. The present *amici* are interested primarily in an additional, alternative approach to this problem. We promote and defend programs that offer low-income parents a meaningful choice of educational alternatives for their children through publicly funded vouchers and scholarships. To be fully effective, these programs must include a wide

variety of educational options, including high quality parochial schools. State sponsorship of such school choice programs is the subject of ongoing litigation that presents constitutional issues closely related to those the Court will consider here.

Amici believe that the principles this Court has enunciated in its prior Establishment Clause decisions mandate the conclusion that school choice programs are constitutional. *Amici* do not, of course, ask this Court to address this question in the present cases. We ask only that the Court remain cognizant of school choice in crafting its opinion, and that the Court thereby reaffirm the principles *amici* believe establish the constitutionality of state-sponsored school choice.

Solutions to the crisis in the education of underprivileged children inevitably will involve private and parochial schools, which often are the only institutions providing high-quality education in inner-cities. Unfortunately, our present system consigns poor parents and their children to failed public schools. School choice programs give these parents a way out—the option to choose the best education for their children. By providing partial or full tuition for parents who choose private or alternative public schools, school choice programs empower parents to control their children's future, and promote accountability and incentives for improvement among the schools in competition for parents' tuition dollars. School choice enables parents to exercise their constitutional right to choose their children's school, including their right to choose a parochial school.

Two fundamental aspects of state-funded school choice programs ensure that they do not constitute an establishment of religion: such programs are neutral toward religion, and they "aid" sectarian institutions only indirectly through the independent and private decisions of individual parents. School choice programs that give parents an option to send their children to parochial schools are neutral towards religion because they provide assistance to a class of beneficiaries defined without reference to religion and do not restrict choices to religious schools. School choice programs do not constitute direct aid to sectarian institutions because no funds are transmitted to schools except upon the direction of parents. "Where ... aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Mueller v. Allen*, 463 U.S. 388, 399 (1983). Whatever the outcome in the present cases, the Court should hold inviolate these Establishment Clause principles of neutrality and private decision making.

These principles cannot be reaffirmed often enough. In a recent decision of the Wisconsin trial court considering the constitutionality of the state-funded school choice program in Milwaukee, the court refused to accept this Court's constitutional delineation between direct and indirect assistance. To the Wisconsin court, a program of parental choice constitutes state assistance to sectarian schools no less direct than if the state had determined where the money was to go; this Court's decisions to the contrary were simply misguided: "Although the U.S. Supreme Court has chosen to turn its head and ignore the real impact of such aid, this court refuses to accept that myth." *Jackson v. Benson*, No. 95-CV-1982, Memorandum

Decision and Order at 28 (Wisc. Dane Cty. Circ. Ct. Jan. 15, 1997). A rule that can engender this kind of disrespect from lower tribunals is in need of reassertion.

ARGUMENT

I. THE NATION DESPERATELY NEEDS INNOVATIVE SOLUTIONS TO THE CRISIS IN THE EDUCATION OF POOR CHILDREN

A. Low-Income Children Are Not Receiving the Education They Deserve

The importance of education to the lives of our children and the future of our Nation is beyond peradventure:

> [E]ducation is ... a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Brown v. Board of Education, 347 U.S. 483, 493 (1954). Education provides not only the basic skills necessary for meaningful participation in the American economy and political system, but, at least as important, inculcates those basic values critical to the orderly functioning of American society.

The American education system has failed many of our children. In the 1991 International Assessment of

Educational Progress, United States 13-year-olds ranked twelfth of fourteen countries in math and science. Daniel McGroarty, *Break These Chains: The Battle for School Choice* at 17-18 (Forum, 1996). The bellwether National Assessment of Educational Progress ("NAEP") reveals that only 30 percent of fourth graders, 30 percent of eighth graders, and 36 percent of twelfth graders nationwide were reading at a proficient level in 1994. Paul L. Williams, et al., *NAEP 1994 Reading: A First Look* at 15 (U.S. Dept. Ed., 1995). In the interval between 1992 and 1994 alone, the average reading assessment score for twelfth-grade students declined significantly. *Id.* at 7.

These educational deficiencies are greatest among poor and minority children. "[I]n large cities—whose poor and minority children desperately need quality education—the [high school drop out rate] can climb to 50 percent." John E. Chubb and Terry M. Moe, *Politics, Markets, and America's Schools* at ix (Brookings, 1990). In the District of Columbia, for example, more than 40 percent of public school students drop out before high school graduation. Valerie Strauss and Sari Horwitz, *Students Caught in a Cycle of Classroom Failures*, Washington Post A1 (Feb. 20, 1997). Recent NAEP data shows African-American and Hispanic children lagging considerably behind whites in reading, writing, math, and science performance at all ages and grade levels studied—17-year-old black students in 1994, for example, were reading at a level equivalent to 13-year-old whites—and the gap generally has been growing in recent years. Jay R. Campbell, et al., *Report in Brief: NAEP 1994 Trends in Academic Progress* at 7, 9, 11 (U.S. Dept. Ed., 1996). Widespread drug use and rampant violence in the schools that are supposed to be serving these children contribute to and compound these problems. It is

no wonder that a recent national survey found that only 16 percent of respondents believe children in America's inner cities are receiving the education they need. International Communications Research, *A National Survey of Americans' Attitudes Toward Education and School Reform* at 3 (Center for Education Reform, 1996). In many inner-city schools, there simply is no education taking place.

Sadly, for the overwhelming majority of children and their parents who are the victims of this failed system, there is no way out. For most poor children, education overwhelming is received through a single provider, the local school district, which determines what, where, and how students will be taught, with virtually no parental choice in these fundamental matters.[1]

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[1] One of the earliest critiques of the monopolistic American education system came from Kenneth Clark, the educator and psychologist whose work with African-American children so influenced this Court's decision in *Brown*:

> [I]t appears that the present system of organization and functioning of urban public schools is a chief blockage in the mobility of the masses of Negro and other lower-status minority group children. ... [M]inority group children are ... victims of the monopolistic inefficiency of the present pattern of organization and functioning of our public schools.

Kenneth B. Clark, "Alternative Public School Systems," *Network News & Views* at 8, 15 (July 1994) (reprinted from 38 *Harvard Educational Review* (Winter 1968)).

B. Solutions to These Problems Necessarily Must Involve Private and Parochial Schools

Alternatives exist, for those who can afford them, in the very neighborhoods where public school students perform worst. The educational performance of children in private and parochial schools considerably exceeds that of children from similar backgrounds attending public schools. *E.g.*, James S. Coleman, Thomas Hoffer, and Sally Kilgore, *High School Achievement* at 180-81 (Basic Books, 1982). Private and parochial schools provide a safer, more disciplined, and orderly environment than public schools, and impose greater academic demands. *Id.* The recent NAEP data reveal that private school students' reading performance exceeded public school performance at all grade levels examined. *NAEP 1994* at 12. Public school students lacked basic reading skills at more than twice the rate of their private and parochial school counterparts. *Id.* at 22.

"Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans." *Mueller v. Allen,* 463 U.S. 388, 401-02 (1983) (internal quotations omitted). Nowhere has this been more evident than in the education of poor and minority children. In the words of economist Thomas Sowell, "'One of the great untold stories of contemporary American education is the extent to which Catholic schools, left behind in ghettoes by the departure of their original white clientele, are successfully educating black youngsters there at low cost.'" Quoted in Daniel Patrick Moynihan, "Government and the Ruin of Private Education," *Harper's* at 28, 37 (April 1978).

Disadvantaged students in Catholic schools have a lower dropout rate than their peers in public schools. Diane Ravitch, "Somebody's Children," *The Brookings Review* at 9 (Fall 1994). Parental participation is greater in Catholic schools than in public schools, with parents of poor African-American students in particular participating in the PTA at much higher levels in Catholic schools. *Id.* Catholic school students consistently score higher in standardized tests. *Id.* One recent study found Catholic school students' average math achievement "considerably higher" than that of public school students from the same economic class: "By senior year, lower-middle class students attending Catholic schools are achieving 4.5 years ahead of their counterparts in the public sector." Anthony S. Bryk, Valerie E. Lee, and Peter B. Holland, *Catholic Schools and the Common Good* at 246-48 (Harvard, 1993). In Catholic high schools, the average learning rate in math for minority students between the sophomore and senior years was 65 percent faster than the average learning rate of public school students in general, and 100 percent faster than that of their minority counterparts in public schools. *Id.* The study also found that math performance of Catholic school students varies less with economic class than in public schools, and that the difference in math performance between white and minority students is narrower in Catholic schools. Over time, moreover, the white/minority gap narrows in Catholic schools, while it increases in the public schools. *Id.* Such results have led one distinguished research team to conclude: "Catholic schools more nearly approximate the 'common school' ideal of American education than do public schools." *High School Achievement* at 185.

C. School Choice Programs Improve Education By Enabling Poor Parents to Choose the Best Schools For Their Children

The great success of inner-city private and parochial schools has focused attention on education reform proposals that would provide poor parents the opportunity to choose their children's schools. School choice programs provide such opportunities by giving these parents control over a share of their children's education funds to spend wherever they choose. By increasing the educational opportunities available to individual poor and minority children, and thereby increasing competition among public and private schools, school choice programs improve education generally.[2]

A study by two researchers for the Brookings Institution found that when choice is introduced, several mechanisms come into play to improve education: First, a

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[2] School choice also enables parents' fundamental right to choose their children's education, including their right to choose a parochial school. "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of the Sisters of the Holy Names*, 268 U.S. 510, 535 (1925) (Oregon law mandating that all children between the ages of 8 and 16 attend public school "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.").

"process of selection and sorting" occurs, whereby families with different educational goals choose the school that best fits their needs. *Politics, Markets, and America's Schools* at 32-33. The result is a rich educational pluralism: in District 4 in East Harlem, where parents have been freed to choose among different public elementary and junior high schools, successful new schools have arisen to meet the interests of parents and students, including the School of Science and Humanities, the Jose Feliciano Performing Arts School, and the East Harlem School for Health and Bio-Medical Studies. *Id.* at 213.

Second, choice makes schools directly accountable to the clientele they serve. Once a family has selected a school, they should find the school more responsive to their needs and interests.

Third, family movement between schools encourages schools to improve or face declining enrollment and revenues. This is the same economic discipline to which most American institutions and services are subjected, including, of course, our nation's unparalleled colleges and universities.[3] Parochial and other private schools already "afford wholesome competition with our

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[3] Former Xerox Chairman and Deputy U.S. Secretary of Education David T. Kearns has described the American public education system as "the only industry we have where if you do a good job, nothing good happens to you, and if you do a bad job, nothing bad happens to you." Quoted in Abigail Thernstrom, *School Choice in Massachusetts* at 44 (Pioneer Inst., 1991).

public schools." *Mueller*, 463 U.S. at 402 (internal quotations omitted). But with the increased competition engendered by school choice programs, "the quality of all schooling [will] rise so much that even the worst [school], while it might be *relatively* lower on the scale, would be better in *absolute* quality." Milton and Rose Friedman, *Free to Choose* at 170 (Harcourt Brace Jovanovich, 1980) (emphasis original).[4]

The school choice programs conducted to date have delivered precisely the increased parental satisfaction and student performance that their proponents predicted. Two programs in place in Milwaukee, Wisconsin provide striking examples. Partners Advancing Values in Education ("PAVE"), the nation's largest privately-funded voucher program, currently is in its fifth year of operation. PAVE is a privately-funded voucher program run alongside the state-funded scholarship program established for the Milwaukee public schools. A court decision thus far has barred students from applying their state-funded scholarships at religiously-affiliated schools (and thereby effectively barred participating students from a large portion

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[4] School choice offers other benefits as well. For instance, choice "is being used to combat racial segregation; indeed, it has become the preferred approach to desegregation in districts throughout the country—in Rochester and Buffalo (New York), Cambridge (Massachusetts), and Prince George's County (Maryland), to name a few." *Politics, Markets, and America's Schools* at 206. And, of course, as in any other area in which competition is introduced, school choice will the lower cost of education.

of the city' most successful schools), but has allowed low-income youngsters to attend nonsectarian private schools for the past seven years. *See Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992). PAVE, on the other hand, has included parochial schools since its inception. PAVE grants are made to low-income families residing in the Milwaukee metropolitan area who choose to enroll their children in a private elementary or secondary school. Grants are available for up to half of the chosen school's annual tuition.

A 1995 study of PAVE shows an extraordinary level of satisfaction among participating parents. Fully 96 percent of parents said they were satisfied or very satisfied with the amount their children learned, and 96 percent also described themselves as satisfied or very satisfied with their children's teachers. Ninety-seven percent expressed satisfaction with the opportunities the school provided for parent involvement; 92 percent rated their child's school an A or B. Maureen Wahl, *Third-Year Report of the PAVE Scholarship Program* at 6 (PAVE, 1995).

Though improvements in educational performance are more difficult to assess, after only two years, more than 63 percent of PAVE students tested at or above the 50th national percentile rank ("NPR") in reading, and more than 60 percent tested at or above the 50th NPR for math. By contrast, among low-income students in Milwaukee public schools, only 25.2 percent tested at or above the 50th NPR in reading, and only 33.5 percent were at or above the 50th NPR in math. Maureen Wahl, *Second-Year Report of the PAVE Scholarship Program* at 22 (PAVE, 1994).

Similar results have been reported from the state-funded Milwaukee program. Thirty-six percent of choice parents graded their children's school an "A," compared with 27 percent of public school parents, and "[c]hoice parents expressed substantially greater satisfaction than did public school parents with every aspect of their child's education: the amount their child learned, the teacher's performance, the program of instruction, the discipline in the school, the opportunities for parental involvement, the textbooks, and the location of the school." Paul E. Peterson, *A Critique of the Witte Evaluation of Milwaukee's School Choice Program* at 37-38 (Center for American Political Studies, Harvard Univ., 1995).

Even more impressive are the data on academic achievement in Milwaukee. An important recent examination of the Milwaukee program compared the students in the program, who had been selected randomly for inclusion, to a control group who had applied for the program but had been rejected by the same random process. Paul E. Peterson, Jay P. Greene & Chad Noyes, "School Choice in Milwaukee," *The Public Interest* at 38 (Fall 1996). By their third year in the program, choice students scored 3 percentile points higher on a standardized reading test and 5 percentile points higher on a math test than the control group. By year four the differences were even greater, with choice students scoring 5 percentile points higher in reading and 11 percentile points higher in math. *Id.* at 55. These results, "[i]f duplicated nationwide, ... could reduce by somewhere between one-third and more than one-half the current difference between white and minority test score performance." *Id.*

II. UNCHALLENGED PRINCIPLES OF NEUTRALITY AND PRIVATE DECISION MAKING ESTABLISH THE CONSTITUTIONALITY OF STATE-FUNDED SCHOOL CHOICE PROGRAMS

Two fundamental aspects of state-funded school choice programs ensure that they do not constitute an establishment of religion: such programs are neutral toward religion, and they "aid" sectarian institutions only indirectly through the independent and private decisions of individual parents.

"A central lesson of [this Court's] decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S.Ct. 2510, 2521 (1995). School choice programs that give parents an option to send their children to parochial schools are neutral towards religion because the class of beneficiaries is defined without reference to religion, and no financial incentive exists to choose private or religious schools. Such is the nature of the programs in Milwaukee and Cleveland, for example, currently under challenge in the state courts. *See* Wis. Stat. § 119.23; Ohio Rev. Code Ann. §§ 3313.974-.979. The state provides the same benefits to these parents irrespective of the nature of the particular school the parents choose for their children. "[T]he guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 115 S.Ct. at 2521.

The *Rosenberger* Court suggested, nonetheless, that "even ... a neutral program that includes nonsectarian recipients" might violate the Establishment Clause if "the government is making direct money payments to an institution or group that is engaged in religious activity." *Id.* at 2523. Assuming *arguendo* that such payments would constitute an Establishment Clause violation, school choice programs do not suffer from this infirmity because the recipients of government benefits in such programs are the parents, not religious schools. "Where ... aid to parochial schools is available only as a result of *decisions of individual parents* no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Mueller v. Allen*, 463 U.S. 388, 399 (1983) (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)) (emphasis added).

In *Mueller*, the Court sustained against Establishment Clause challenge a Minnesota statute that allowed parents to deduct from their taxes tuition and other educational expenses incurred in sending their children to elementary and secondary schools, including parochial schools. The Minnesota program, like more traditional school choice programs involving vouchers or direct payment to parents, provided benefits to parents sending their children to both public and private schools, with no preference for the sectarian or nonsectarian nature of the school. As in *Rosenberger*, the Court declared that "a program, like [the Minnesota statute], that neutrally provides state assistance to a broad spectrum of citizens is

not readily subject to challenge under the Establishment Clause." *Id.* at 398-99.[5] Petitioners argued that the financial assistance provided to parents under the Minnesota program ultimately had an economic effect comparable to aid given directly to the schools. The Court explained the

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[5] The *Mueller* Court expressly distinguished *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). In that case, the Court held that a tuition assistance grant to parents for use at private schools only violated the Establishment Clause. The *Nyquist* Court noted, however, that assistance made generally available without regard to the sectarian-nonsectarian or public-nonpublic nature of the school might not offend the Establishment Clause. *Id.* at 782-83 n.38. That case arose in *Mueller v. Allen*. The Court there explained the "vital difference" between the universally-applicable Minnesota tax credit and the New York statute at issue in *Nyquist*: In *Nyquist*, "public assistance amounting to tuition grants was provided only to parents of children in *nonpublic* schools" thus showing a possible state preference for parochial schools. *Mueller*, 463 U.S. at 398 (emphasis original). Moreover, *all* of the various aid programs challenged in *Nyquist* directed assistance exclusively to private schools.

The Court noted in *Mueller* that *Nyquist* is an aberration in Establishment Clause jurisprudence. 463 U.S. at 399. To the extent *Nyquist* is still good law, *Mueller* constrained that case to its facts. School choice programs do not run afoul of *Nyquist* because, like the program in *Mueller*, they provide assistance to children attending both sectarian and nonsectarian, public and nonpublic schools, or they exist within an overall framework of school reform that provides a wide range of public and private educational options.

critical difference: "under Minnesota's arrangement public funds become available only as a result of numerous *private choices of individual parents* of school-age children." *Id.* at 399 (emphasis added). Accordingly, there was no "imprimatur of state approval," and no Establishment Clause violation.

The Minnesota program at issue in *Mueller*, which allowed parents to deduct part of their tuition payments from their taxes, is analytically identical to school choice programs like those in Milwaukee and Cleveland, which essentially reimburse parents for part or all of the tuition they pay. In each case, the state has lessened the financial burden on parents who choose a private school for their children. But it remains the *parents* who may choose a parochial school; the state provides no aid to religious organizations. State financial assistance to parents constitutes no establishment of religion.

This Court twice has reaffirmed the rule in *Mueller*, emphasizing that individual choice negates any claim of establishment of a state religion. The petitioner in *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481 (1986), sought to use money from a Washington state vocational rehabilitation program for the blind to attend a Christian college. The Court ruled that the Establishment Clause does not preclude such assistance where aid is provided to the individual who chooses the school to attend. "Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.... [T]he fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State." *Id.* at 488.

Mueller and *Witters* provided the rule of decision in *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993). The Court there held that the Establishment Clause does not prevent the state from providing a deaf student with a sign-language interpreter to accompany him to classes at a Catholic high school. Again the Court explained that any benefit flowing to the school from the disability assistance program was attributable to the private choices of individual parents, and not the action of the state. *Id.* at 10.

Mueller, *Witters*, and *Zobrest* answer definitively any Establishment Clause challenge to school choice. Even the dissent in *Rosenberger*—which concluded that state payment of printing costs for a sectarian student publication violates the Establishment Clause—acknowledged the continuing vitality of *Mueller*, *Witters*, and *Zobrest* and the decisive importance of private decision making in Establishment Clause jurisprudence: the "'attenuated financial benefit[s] [to sectarian institutions], ultimately controlled by the private choices of individual[s],' ... are simply not within the contemplation of the Establishment Clause's broad prohibition." *Rosenberger*, 115 S.Ct. at 2542 (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.) (quoting *Mueller*, 463 U.S. at 400). Providing assistance to parents so that they might choose between various public and private educational alternatives is not a "law respecting an establishment of religion" under any rational understanding of that constitutional phrase.

III. WHATEVER THE OUTCOME IN THESE CASES, THE COURT SHOULD REAFFIRM THOSE PRINCIPLES THAT VALIDATE SCHOOL CHOICE

The foregoing analysis should remain sound however the Court decides these cases. Thus, a decision to overrule *Aguilar v. Felton*, 473 U.S. 402 (1985), and allow Title I services in parochial schools on the same basis they are allowed in public and other private schools, will constitute a reaffirmation of the principle of neutrality. Like school choice programs, Title I provides services to underprivileged children irrespective of the sectarian or nonsectarian nature of the school they attend. Such programs carry a strong presumption of constitutionality.

The Court invalidated the Title I program at issue in *Aguilar* because it concluded that the provision of government funded instruction in parochial schools constitutes an excessive entanglement between church and state. 473 U.S. at 409. Several members of the Court have called for the reconsideration or overruling of this decision, and have questioned the continuing utility of the entanglement prong of the Establishment Clause test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S.Ct. 2481, 2498 (O'Connor, J.), 2505 (Kennedy, J.), 2515 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J.) (1994). Reversal in the present cases will require the Court either to recede from the expansive reading of entanglement in *Aguilar*, or discard excessive entanglement as an element of Establishment Clause jurisprudence altogether. In either event, the Court will hold that the mere involvement of the state in attempts to

improve the education of children in a variety of schools is not the establishment of religion. School choice programs will benefit.

Reaffirmation of *Aguilar*, on the other hand, likely will require a finding of excessive entanglement in the provision of Title I services in parochial schools.[6] The

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[6] The *Aguilar* Court did not purport to find a problem with Title I under the first two prongs of the *Lemon* test: a valid secular purpose, and a primary effect that neither advances nor inhibits religion. *See Lemon*, 403 U.S. at 612. Assuming *Lemon* still provides the relevant inquiry in Establishment Clause cases, school choice programs meet these two criteria. Like Title I, school choice programs are designed to promote the valid secular purpose of improving education for underprivileged children. As to primary effect, a majority of the Court in *Witters* declared that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries." 474 U.S. at 490-91 (Powell, J., joined by Burger, C.J., and Rehnquist, J.); *id.* at 490 (White, J.) (agreeing with Powell on this point); *id.* at 493 (O'Connor, J.) (same).

For the same reason, school choice programs do not constitute an unconstitutional "endorsement" of religion. *Id.* at 493 (O'Connor, J.) ("The aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw ... an inference that the State itself is endorsing a religious practice or belief.").

entanglement about which the Court was concerned in *Aguilar* derived from the presence of government funded instructors in parochial school classrooms and the efforts necessary to keep the government and religious instruction separate. 473 U.S. at 412-13. No such problem exists in school choice programs because there is no such contact between the state and parochial schools. The schools provide education as they see fit (subject only to the ordinary requirements for state accreditation) and receive payment for their services from the parents of the children who attend. The state puts money behind the parents' choices, and may establish certain minimal requirements for school participation in the choice program, such as nondiscrimination in admissions. But the state does not otherwise interact with the school or involve itself in the school's internal affairs. Nor does it matter that state funds can be traced to sectarian institutions as part of a school choice program, as long as the decision to choose a particular school is in the hands of a parent or student. *See, e.g., Witters*, 474 U.S. at 751.[7]

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[7] In his concurrence in *Aguilar*, Justice Powell asserted another alleged infirmity of the Title I program at issue in these cases: the program violates the Establishment Clause because it "amounts to a state subsidy of the parochial schools by relieving those schools of the duty to provide the remedial and supplemental education their children require." 473 U.S. at 417 (Powell, J., concurring). Even if the Court agrees with Justice Powell in these cases, it is plain that school choice programs do not relieve parochial schools of any duty they otherwise would have assumed. Absent state funding, the children in choice programs would be unable to

[Footnote continued on next page]

However the Court chooses to characterize the Title I program in the present cases, school choice programs provide no aid to schools; they provide aid to *parents*. The provision of financial assistance to low-income parents does not help private and parochial schools; it simply widens the circle of students who may be enriched by the superior education these schools offer. The Court can reaffirm in this case that indirect effects on parochial schools resulting from the independent and private choice of parents are not proscribed by the Establishment Clause.

[Footnote continued from previous page]

attend private and parochial schools; the schools are relieved of no burden because the state enables these children to attend classes.

CONCLUSION

"[I]t is doubtful that any child may reasonably be expected to succeed in life if ... denied the opportunity of an education." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Poor students trapped in dangerous and nonfunctioning public schools today suffer from a *de facto* system of segregation no less oppressive than that at issue in *Brown*. Access to quality private and parochial schools offers a way out. *Amici* ask that this Court take care to reaffirm the constitutional principles that will allow help for those who most need it.

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